(11)

No. 06-6407

In The Supreme Court of the United States

SCOTT LOUIS PANETTI,

Petitioner,

versus

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF NATIONAL ALLIANCE FOR THE MENTALLY ILL (NAMI)

JOHN H. BLUME*
CHRISTOPHER SEEDS
CORNELL LAW SCHOOL
110 Myron Taylor Hall
Ithaca, New York 14853
(607) 255-1030

QUARLES & BRADY LLP
411 E. Wisconsin Ave.
Milwaukee, WI 53202
(414) 277-5000

*Counsel of Record

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICUS CURIAE[1]

NAMI (the National Alliance on Mental Illness) is the nation's largest grassroots mental health organization dedicated to improving the lives of persons living with serious mental illness and their families. Founded in 1979, NAMI has become the nation's voice on mental illness, a national organization including NAMI organizations in every state and in over 1,100 local communities across the country, who join together to meet the NAMI mission through advocacy, research, support, and education. NAMI is dedicated to the eradication of mental illnesses and to the improvement of the quality of life of all whose lives are affected by these diseases. NAMI joins this brief in its belief that education and understanding about mental illness at all levels of judicial and legal systems is crucial to the appropriate disposition of cases involving offenders suffering from mental illness.

REASONS THE WRIT SHOULD BE GRANTED

I. INTRODUCTION

Twenty years ago, this Court heard the case of Alvin Ford, a schizophrenic death row inmate. Ford was delusional; he firmly and falsely believed that he could not be executed. Ford's attorneys argued that the Eighth Amendment prohibits the execution of persons who are incompetent or insane. This Court agreed. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). Justice Powell's

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

concurring opinion, which sought to "determine the precise definition" of "the category of defendants defined by their mental state" for whom the Eighth Amendment bars execution, *id.* at 419, provided what most lower courts now recognize as the standard for determining whether a State may execute a mentally ill or cognitively impaired prisoner. *See Penry v. Lynaugh*, 492 U.S. 302, 333 (1989). According to Justice Powell:

> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly . . . the Eighth Amendment forbids the execution only of those who are unaware of [1] the punishment they are about to suffer and [2] why they are to suffer it.

Ford, 477 U.S. at 422 (Powell, J., concurring) (emphasis added).[2]

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[2] In Ford's support, organizations of mental health professionals, including the American Psychiatric Association and the American Psychological Association entered as *amici curiae*, to ensure that "the process by which such decisions are made be fair and reliable so as to protect the integrity of the determination and the role to be played by psychiatric opinions in reaching that determination." Brief of Amicus Curiae for the American Psychiatric Association, *Ford v. Wainwright*, No. 85-5542 (1985); *see* Brief of Amici Curiae for the American Psychological Association and Florida Psychological Association, *Ford v. Wainwright*, No. 85-5542 (1985). The *amici* did not express opinion on the existence of an Eighth Amendment right or on the appropriate language for a governing legal standard; "resolution on those matters," one *amicus* wrote, "turns on considerations as to which [it] possesses no special expertise." *Id.* at 6. *Amici* simply urged that if there was a right protecting the insane from execution, the Court must not "denigrate" that right by skirting reliability of the evaluations upon which competency-to-be-executed determinations would rely. *See id.* at 7.

The Eighth Amendment categorical bar against executing incompetent persons – if it is to be applied fairly and reliably – is compromised by the Fifth Circuit's interpretation and application of the competency to be executed standard. In the past year, the American Psychiatric Association, the American Psychological Association, and the American Bar Association all have adopted resolutions or position statements addressing the execution of prisoners who suffer from severe mental illness. The American Psychiatric Association has publicly expressed concern over the Fifth Circuit's interpretation of the *Ford* standard, seeing in it "confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose for (reasons for) the execution." American Psychiatric Association, *Mentally Ill Prisoners on Death Row*, Commentary on Position Statement (Dec. 2005); *see* American Bar Association, Resolution 122A (Aug. 8, 2006). *Amici* share this concern. The important issue presented by this case is whether the competency to be executed standard currently used by the Fifth Circuit is under-inclusive in a constitutionally offensive manner. *Amici* submit that it is.

Panetti v. Dretke, 448 F.3d 815 (5th Cir. 2006) is a striking case, not only because of the severity of petitioner's mental illness, his farcical self-representation in the fiasco that served as his trial, and the widespread media coverage the case has received (*see, e.g.*, Blumenthal & Liptak, *Judging Whether a Killer Is Sane Enough to Die*, N.Y. Times (June 2, 2006)), but because unlike many cases involving testimony of psychiatric diagnosis and opinion, the experts agree that Panetti is severely mentally ill. In fact, they agree that Panetti suffers from schizophrenia, the most debilitating mental illness. The focus of this case, therefore, lies not in a battle of the experts as to whether Scott Panetti is severely mentally

ill, he clearly is and there is no dispute about it. The issue is whether his schizophrenia renders him incompetent to be executed; therefore, the focus of this brief is on the Fifth Circuit's interpretation and implementation of the constitutional mandate of *Ford*. *See Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006).

Amici have two central concerns. The first is the failure of the Fifth Circuit's competency to be executed standard to comport with the retributive rationale for the right espoused in *Ford*. *See* Petitioner's Brief at 24-32. The second concern, which is more significant to mental health professionals and organizations, is the fact that the Fifth Circuit's standard draws medically arbitrary distinctions between severely mentally ill persons. For both reasons, the Fifth Circuit's errant application of *Ford* wrongly and arbitrarily renders severely mentally ill prisoners subject to execution. More specifically, *Amici* are concerned here with death sentenced prisoners whose delusions, disorganized thought processes, or other mental impairments *directly* impact their ability to internalize the fact that they will be executed and/or the actual reason for their execution. The Fifth Circuit's interpretation of *Ford* wrongly excludes this set of prisoners from the Eighth Amendment category established in *Ford*.

Amici begin by explaining the delusional belief systems characteristic of schizophrenia. We then discuss how the Fifth Circuit's interpretation of *Ford* fails to take these significant impairments into account, specifically with regard to Mr. Panetti. Finally, we discuss a proper interpretation of *Ford*, one that was recently articulated and embraced by the American Psychiatric Association.

II. SCHIZOPHRENIA & DELUSIONAL BELIEF SYSTEMS

Within the set of prisoners whose delusions, disorganized thought processes, or other mental impairments *directly* impact their ability to internalize the finality of their execution and the actual reason for the execution, the most prevalent affliction, and that which affects Mr. Panetti, is schizophrenia. The clinical diagnosis of schizophrenia involves a finding of one of the following symptoms: (a) thought echo, thought insertion or withdrawal, or thought broadcasting; (b) delusions of control or influence or delusional perceptions; (c) hallucinatory voices; and (d) persistent delusions of other kinds that are culturally inappropriate and completely impossible. World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (Geneva, 1993). The diagnostic criteria for schizophrenia under the DSM-IV likewise involve a finding of one or two (depending upon severity) of the following symptoms: (1) delusions; (2) hallucinations; (3) disorganized speech; (4) grossly organized or catatonic behavior; (5) negative symptoms such as affective flattening. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Wash. DC, 1994). As the criteria show, perceptual and thought disorders are the core elements of the clinical definition of schizophrenia:

> The feature common to all manifestations of schizophrenia thought disorder is that patients think and reason on their autistic terms according to *their own* intricate private rules of *logic*. Schizophrenic patients may be highly intelligent, certainly not confused, and they may be painstaking in their abstractions and deductions. But

> their thought processes are strange and do *not* lead to conclusions based on *reality*. . . .

Cancro & Lehmann, *Schizophrenia: Clinical Features*, in Kaplan & Sadock's Comprehensive Textbook of Psychiatry, 7th ed., vol. 1 (2000), at 1189 (emphasis added).

The thought disorders – delusions – that underlie schizophrenia are often persistent. And often, from the perspective of everyone other than the patient, they do not equate with logic. *See* WHO, *ICD-10*. By definition, delusions are "false ideas that cannot be corrected by reasoning and that are idiosyncratic for the patient (i.e., not part of the patient's cultural environment). *Id.* at 1187; *see also Mental Health: A Report of the Surgeon General* (2002) ("Delusions are firmly held erroneous beliefs due to distortions or exaggerations of reasoning and/or misinterpretations of perceptions or experiences.") (internal quotation and citation omitted). Most commonly, the delusions experienced by a person suffering from schizophrenia involve a scenario of persecution accompanied by grandeur, battles between good and evil involving high stakes. Cancro & Lehmann at 1187-88. As the National Institute of Health explains:

> Delusions are false personal beliefs that are not part of the person's culture and do not change, even when other people present proof that the beliefs are not true or logical. People with schizophrenia can have delusions that are quite bizarre, such as believing that neighbors can control their behavior with magnetic waves, people on television are directing special messages to them, or radio stations are broadcasting their thoughts aloud to others. They may also have delusions of grandeur and think they are famous

> historical figures. People with paranoid schizophrenia can believe that others are deliberately cheating, harassing, poisoning, spying upon, or plotting against them or the people they care about. These beliefs are called delusions of persecution.

NIMH, *Schizophrenia*, NIH Publication No. 3517 (2004).

In sum, two defining features characterize the delusions that make up schizophrenia: first, the delusions are not based on the patient's cultural environment – in broad terms, they are not based on reality; second, the delusions are firmly held beliefs that are not subject to change, even in the presence of true, logical proof. Neither feature, however, factors into the Fifth Circuit's interpretation of *Ford*.

III. THE FIFTH CIRCUIT'S MISGUIDED INTERPRETATION OF *FORD*

The Fifth Circuit maintains that it uses Justice Powell's competency to be executed standard in evaluating *Ford* claims. *Panetti*, 448 F.3d at 819 (citing *Lowenfield v. Butler*, 843 F.2d 183, 187 (5th Cir. 1988)). But the Court of Appeals' interpretation of what it means for a prisoner to be "unaware of the punishment they are about to suffer and why they are to suffer it," *Ford*, 477 U.S. at 422 (Powell, J., concurring), only partially encompasses the mentally ill individuals Justice Powell had in mind. The Fifth Circuit's understanding of the competency to be executed standard is essentially this: A severely mentally ill prisoner is competent to be executed if he is merely aware of the reason the State has given for executing him. According to the Court of Appeals, a prisoner need not "rationally understand" or comprehend the reason for his

execution, he need only be "aware" of it. *Panetti*, 448 F.3d at 819 (citing *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994)).

In *Barnard*, the Fifth Circuit found a prisoner competent who knew he was to be executed on a certain day, and who knew he was to be executed for killing a boy during a robbery. The court deemed it of no consequence that the prisoner simultaneously believed his pending execution was the final chapter of a delusional conspiracy against him rather than punishment for felony murder. 13 F.3d at 876. In this case, the court concluded that Panetti's competency claim was governed by *Barnard*. And the court ruled Panetti competent because Panetti can parrot that the State told him he would be executed for killing his wife's parents. That, according to the court below, satisfied the "nature, pendency, and purpose" test the court applied in *Barnard*. *Panetti*, 448 F.3d at 819.

A. The Factual Discrepancy Between *Barnard* And *Ford*

Barnard, however, is fundamentally at odds with *Ford*. The starkest evidence that the line the Fifth Circuit has drawn is not one this Court intended is that, by the Fifth Circuit's approach, the symptoms alleged by Alvin Ford, whose claims gave rise to the governing standard, would not make the constitutional cut. In response to assertions that he would be executed, Alvin Ford acknowledged, "I know there is some sort of death penalty." *Ford*, 477 U.S. at 403. But Ford also believed that he had eliminated executions and therefore could not suffer the death penalty. *Id.* In essence, Ford's response when told of his impending execution was, "I know you say there is a death

penalty by which you will execute me, but I do not believe it." Ford's belief that he had eliminated executions, coupled with his perception that he "owned the prisons and could control the Governor through mind waves," *id.*, was firmly at odds with reality.

Contrary to *Barnard*, a plurality of this Court viewed the dichotomy between reality and Ford's delusional belief as evidence of incompetence, justifying a remand to state court for a competency hearing. *Id.* at 410 ("Petitioner's allegation of insanity in his habeas corpus petition, if proved, therefore, would bar his execution."). And Justice Powell, reviewing the facts under his newly announced standard for competence to be executed, asserted that if the facts Ford presented were accurate, "petitioner's claim of insanity plainly fits within this standard. According to petitioner's proffered psychiatric examination, petitioner does not know that he is to be executed, but rather believes that the death penalty has been invalidated." *Id.* at 422 (Powell, J., concurring).[3] For both the majority and concurring opinions in *Ford*, execution could only be justified if it had retributive value. And that value, in the Court's view, was lost on prisoners like Ford, who did not believe and therefore had not internalized the finality of execution.

The facts of *Ford* display the flaws in the Fifth Circuit's interpretation of Justice Powell's standard. That court fails to take into account precisely the thought impairments and the resulting impossible beliefs that the

[3] Unlike *Ford*, Panetti's delusional belief system affects his ability to appreciate the reason "why" he will be executed, rather than, as in Ford's case, the fact of execution itself.

Ford Court found indicative of incompetence. The Fifth Circuit ignores the medical condition, deemed relevant in *Ford*, in which dichotomous belief systems impair mentally ill prisoners from internalizing "why" they will be executed.[4]

B. Panetti Deserves Protection Under *Ford*, But Is Denied It Under *Barnard*

Mr. Panetti's schizophrenic symptoms place him well within the category of severely mentally ill persons whose executions are prohibited by the Eighth Amendment. Since 1986 (six years prior to the crime), Panetti has been diagnosed repeatedly as suffering from schizophrenia or schizoaffective disorder.[5] No diagnosis has contradicted

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[4] The Fifth Circuit's decision in *Lowenfield*, cited by the Fifth Circuit as the case in which it adopted Justice Powell's standard, treads much more closely to *Ford* than *Barnard*. In *Lowenfield*, the Fifth Circuit held that a diagnosis by a single psychologist that the defendant was a paranoid schizophrenic did not present a threshold showing of incompetence to be executed under *Ford*. 843 F.3d at 187. *Lowenfield* characterized the *Ford* standard as whether the prisoner "'comprehends the nature of the penalty' and whether the prisoner's mental illness 'prevents him from comprehending the reasons for the penalty or its implications.'" *Id.* at 187 (quoting *Ford*, 477 U.S. at 417).

[5] *See* Scott Panetti's medical records, admitted as State Exhibits 1 through 6 at the second competency-to-stand-trial proceeding in 1994: Panetti was diagnosed at Starlite Village Hospital with chronic undifferentiated schizophrenia in April 1986; diagnosed at Kerrville State Hospital with schizophrenia in mid-May 1986; diagnosed at Waco Veteran's Hospital with chronic undifferentiated schizophrenia in late May 1986; diagnosed at Tomah Veteran's Hospital with schizophrenia in July 1986; diagnosed at Starlite Village Hospital with schizophrenia in October 1986; diagnosed at Kerrville Veterans Hospital as suffering from schizoaffective disorder in November 1986; and diagnosed at Kerrville Veterans Hospital as suffering from schizoaffective disorder in 1992, just months before crime. Panetti

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that Panetti suffers from a schizophrenic condition.[6] Both doctors who examined Panetti to determine his competence to stand trial recognized schizophrenia and schizophrenic symptoms. *See* Petitioner's Brief at 4-7. Both agreed that Panetti's delusions and other symptoms would worsen if Panetti stopped taking antipsychotic medication, which he did shortly before representing himself at trial

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was also diagnosed at Cumberland Memorial Hospital with depression, brain dysfunction, auditory hallucinations, homicidal ideations, and delusions in August 1986; diagnosed at Northern Pines Unified Services Center as suffering from depression and suicidal ideation in September 1986; committed to Kerrville State Hospital in 1990 for homicidal behavior after threatening to kill himself, his wife, baby, and father-in-law, believing the citizens of Kerrville were plotting against him. These diagnoses are not inconsistent with the diagnoses of schizophrenia. Further, during the competency-to-be-executed proceedings, Dr. Conroy, a forensic psychologist, diagnosed Panetti as suffering from schizoaffective disorder, a form of schizophrenia. *See* transcript of federal district court competency-to-be-executed hearing, vol.1, at 14, 21-22 (*Amici* adopt Petitioner's citation form and will refer to the hearing transcript as "FH"). Dr. Cunningham, a clinical and forensic psychologist, testified that Panetti suffers from a disorder on the schizophrenic and/or schizoaffective spectrum, that he is actively psychotic. *See Panetti v. Dretke*, 401 F.Supp.2d 702, 707 (W.D. Texas 2004) (finding Panetti suffers from "some form of mental illness", which doctors had characterized as schizoaffective disorder).

[6] Of the experts appointed during the competency-to-be-executed proceedings, Dr. Anderson, a court-appointed forensic psychiatrist, refused to diagnose schizophrenia because she did not believe the diagnosis relevant to the *Ford* standard (Dr. Anderson also did not reach a conclusion as to whether Panetti was competent to be executed.). 2 FH 40-41. Dr. Parker, a court-appointed clinical psychologist, found that Panetti has "serious psychological problems." 1 FH at 134. Dr. Rosin, a psychologist, recognized that Panetti suffered from a fixed delusional system. 1 FH at 82, 89-90. And Dr. Silverman, a psychiatrist, testified that the dosages of medication that Panetti was taking before trial were "diagnostic of psychotic illness." 1 FH at 122.

and which he never resumed.[7] *See* Petitioner's Brief at 8-10. And each of the mental health experts who testified during the District Court competency hearings agreed (whether they reported a diagnosis of schizophrenia or not) that Panetti suffers from a fixed delusional belief system: While Panetti is aware of the State's stated reason for executing him, he believes that the State, in conjunction with forces of darkness, wants to kill him for preaching the Gospel. *See Panetti*, 401 F.Supp.2d at 708-09; *id.* at 708, n.3. Panetti's mind holds a composite belief that is completely impossible.

Under *Barnard*, this dichotomy – and more important, this tension – between reality and Panetti's delusion is irrelevant. But under *Ford*, the fact that Panetti believes the State's explanation for his execution is a "sham," (1 FH

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[7] That Panetti was permitted to represent himself after going off the antipsychotic medication he was taking when found competent to stand trial is also profoundly troubling to *Amici*. *See* Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 Cath. U. L. Rev. 1153, 1163-65 (2005); *see also* Jodi L. Vilojen et al., *An Examination of the Relationship Between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology*, 26:5 Law & Hum. Behav. 481, 497 (2002) ("In comparison to defendants with other types of psychotic disorders . . . defendants with schizophrenia demonstrated considerable more impairment on legal abilities. This finding is consistent with the high rates of cognitive and functional impairments in individuals with schizophrenia."). Two doctors who had previously treated Panetti, and who had previously diagnosed him as suffering from schizophrenia, watched the trial. Dr. F. E. Seale who treated Panetti at Starlite Village Hospital in 1986 stated that during the trial Panetti was suffering from "delusion," "totally out of touch with reality," and "obviously mentally ill." Affidavit of F. E. Seale, Ph.D. Dr. Wolfgang Selck, who treated Panetti at Starlite Village Hospital in April 1986, stated that Panetti's inappropriate and grandiose self-representation at trial was the product of delusion and constituted a "break from reality." Affidavit of Wolfgang Selck, Ph.D.

at 25; *see* Petitioner's Brief at 20), a pretextual explanation by authorities to cover up the forces of darkness' plot to stop his preaching of the Gospel, eviscerates the retributive benefit of executing the man. It is evident that Panetti, though aware of his legal proceedings, has not internalized "the nature of the debt that [he] owe[s] society." Christopher Slobogin, *Minding Justice: Laws That Deprive People With Mental Disability of Life and Liberty*, at 94 (Harvard University Press, 2006). In accord with the retributive rationale for the Eighth Amendment right adopted by the *Ford* majority and concurring opinions, Panetti's express disbelief of the State's reason is clear evidence that he is incompetent.

IV. THE PROPER INTERPRETATION OF THE *FORD* STANDARD: MERE "AWARENESS" IS NOT A MEANINGFUL REQUIREMENT FOR A STANDARD PREVENTING EXECUTION OF THE INSANE

This case exemplifies why mere "awareness," the test applied by the Fifth Circuit, is not a meaningful requirement for determining whether to execute prisoners who are severely mentally ill. The mere awareness test makes no sense when applied to a prisoner who is plagued by delusions of grand persecution, as severely mentally ill, schizophrenic individuals like Mr. Ford and Mr. Panetti very often are. From the perspective of the mental health profession, and with regard to diagnoses of schizophrenia and related mental illnesses in particular, the distinction that the Fifth Circuit draws between "rational understanding" and "awareness," *see Panetti*, 448 F.3d at 819-21

(citing *Barnard*), is false. A severely mentally ill patient who lacks "actual awareness," lacks awareness, period.[8] Hence the concern of the American Psychiatric Association over the Fifth Circuit's decision in *Barnard*:

> There has been some confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose for (reasons for) the execution. In *Barnard v. Collins*, decided by the Fifth Circuit in 1994, the state habeas court had found that Barnard's "perception of the reason for his conviction and impending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia." Despite the fact that Barnard's understanding of the reason for his execution was impaired by delusions, the Fifth Circuit concluded that his awareness that "his pending execution was because he had been found guilty of the crime," was sufficient to support the state habeas court's legal conclusion that he was competent to be executed.

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[8] This is not a matter of epistemology about what it means to "know" – certainly there are different types of knowledge, in linguistic terms and in legal standards, and it is the law's provenance to determine the meaning of "knowledge" or "awareness" in any given context. Nor does the issue here involve a metaphysical debate over the nature of life and death. *Cf. Walton v. Johnson*, 440 F.3d 160, 179 (4th Cir. 2006) (Wilkinson, J. concurring) ("Judges called upon to interpret the Eighth Amendment may not engage in metaphysical inquiries under the guise of constitutional interpretation. . . . The Powell test appreciates that the Constitution does not countenance judicial forays into inherently philosophical arenas."). *Amici*'s contention is simply that the *Barnard* test excludes persons who are in fact incompetent to be executed.

> In order to emphasize the need for a deeper understanding of the state's justifying purpose for the execution, [the APA] would require that an offender not only must be "aware" of the nature and purpose of punishment but also *must "appreciate" its personal application in the offender's own case* – that is, why it is being imposed on the offender. This formulation is analogous to the distinction often drawn between a "factual understanding" and a "rational understanding" of the reason for the execution. If, as is generally assumed, the primary purpose of the competence-to-be executed requirement is to vindicate the retributive aim of punishment, then offenders should have more than a shallow understanding of why they are being executed.

American Psychiatric Association, *Mentally Ill Prisoners on Death Row*, Commentary on Position Statement (Dec. 2005) (emphasis added) (citations omitted); *accord Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty*, 54 Cath. U. L. Rev. 1115 (2005), § 3(a); Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Cath. U. L. Rev. 1169, 1173 (2005).

As the APA emphasizes, mere "awareness" of "the nature and purpose of punishment" has little meaning in the context of an individual suffering from delusional belief systems. *Amici* agree with the APA that a meaningful (and faithful) interpretation of the *Ford* standard requires more; a mentally ill individual must "appreciate" the "personal application" of the punishment "in the offender's own case." To be competent, a prisoner must have the capacity to reflect on the execution as punishment for the crime

committed and *internalize the execution as payback to society*. This requires that a condemned inmate have enough grasp of reality to believe that he really will die, and enough to believe that the real reason he will die is because of his crime.[9]

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[9] It is important to emphasize that *Amici*'s position is not that *all* prisoners diagnosed with schizophrenia are categorically incompetent for execution. Nor is *Amici*'s position that *Ford* exempts from execution *only* those who have been diagnosed with schizophrenia or a particular mental illness. *See* Honberg, 54 Cath. U. L. Rev. at 1166 ("If we define mental illness diagnostically in a narrow way with just five or six discrete diagnoses, we would be under-inclusive. This would exclude some people who may not fit within the specified diagnostic categories, but who nevertheless may be profoundly disabled."). Schizophrenia has a diverse and yet undetermined causality. *See* www.NAMI.org ("Scientists still do not know the specific causes of schizophrenia, but research has shown that the brains of people with schizophrenia are different, as a group, from the brains of people without the illness. Like many other medical illnesses such as cancer or diabetes, schizophrenia seems to be caused by a combination of problems including genetic vulnerability and environmental factors that occur during a person's development.") (last visited Oct. 8, 2006). And the illness is manifest by a variety of symptoms: Overt symptoms, such as delusions and hallucinations; disorganized systems, such as confused thinking, speech, and behavior; and negative symptoms, such as emotional flatness, lack of expression, and an inability to start and complete activities, all support a diagnosis of schizophrenia. *See* www.NAMI.org ("No one symptom positively identifies schizophrenia. All of the symptoms of this illness can also be found in other brain disorders."); *see generally* National Institute of Mental Health, *Schizophrenia*, available at www.nimh.nih.gov/publicat/schizoph.cfm (last visited Oct. 8, 2006).

But not all of these symptoms impair a prisoner's ability to be "aware of the punishment they are about to suffer and why they are to suffer it." *See Ford*, 477 U.S. at 422 (Powell, J., concurrence). Emotional flatness or lack of expression, for example, has little to say, beyond suggesting the presence of other symptoms of schizophrenia, about a person's ability to comprehend a State's reason for execution or the fact of execution itself. Even overt symptoms such as hallucinations and delusions, and disorganized symptoms such as loose association, may not render a prisoner incompetent to be executed unless those

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A prisoner like Ford, who does not believe he will die and who fails to appreciate the finality of execution, never internalizes punishment and does not acknowledge the payback to society manifest in execution. Likewise, a prisoner like Panetti, who believes he is being executed for preaching the Gospel – an affront to forces of darkness wholly beyond social reality – never internalizes that his execution is remuneration to society. As the APA stresses, prisoners suffering from mental impairments like Barnard and Panetti should not be deemed competent for execution under *Ford*. But they *are* in the Fifth Circuit.

A legal test measuring a death sentenced inmate's competency to be executed cannot be inherently inconsistent with medical knowledge, practice and standards. When a court distinguishes between mentally ill prisoners based on a parsing of words or a subjective choice from a variety of dictionary definitions – distinctions that make no medical sense – a court undermines the expert evaluations upon which the competency hearing itself is based, and thus undercuts the reliability of the determination. The Fifth Circuit's parsimonious interpretation of *Ford* thwarts the views of the qualified physicians who examined Scott Panetti, and, thereby, renders the competency determination unreliable.

Amici endorse the APA's interpretation of the *Ford* standard as in accord with the retributive rationale adhered to in *Ford* and as a proper definition of the range of debilitating mental illness that a majority of the Court

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symptoms directly impair the prisoner's ability to appreciate the finality of the execution and to acknowledge the retributive nature of the punishment, the execution as payback to society for the crime the prisoner committed.

and Justice Powell believed the Eighth Amendment protects. *Amici* urge this Court to grant certiorari to address the Fifth Circuit Court of Appeals' erroneous interpretation and application of Justice Powell's standard.

CONCLUSION

WHEREFORE, for the reasons set forth above, the writ of certiorari should be granted.

Respectfully submitted,

JOHN H. BLUME*
CHRISTOPHER SEEDS
CORNELL LAW SCHOOL
110 Myron Taylor Hall
Ithaca, New York 14853
(607) 255-1030

QUARLES & BRADY LLP
411 E. Wisconsin Ave.
Milwaukee, WI 53202
(414) 277-5000

Counsel of Record

Attorneys for Amicus Curiae

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(11)

No. 06-6407

In The Supreme Court of the United States

SCOTT LOUIS PANETTI,

Petitioner,

versus

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF NATIONAL ALLIANCE FOR THE MENTALLY ILL (NAMI)

JOHN H. BLUME*
CHRISTOPHER SEEDS
CORNELL LAW SCHOOL
110 Myron Taylor Hall
Ithaca, New York 14853
(607) 255-1030

QUARLES & BRADY LLP
411 E. Wisconsin Ave.
Milwaukee, WI 53202
(414) 277-5000

*Counsel of Record

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICUS CURIAE[1]

NAMI (the National Alliance on Mental Illness) is the nation's largest grassroots mental health organization dedicated to improving the lives of persons living with serious mental illness and their families. Founded in 1979, NAMI has become the nation's voice on mental illness, a national organization including NAMI organizations in every state and in over 1,100 local communities across the country, who join together to meet the NAMI mission through advocacy, research, support, and education. NAMI is dedicated to the eradication of mental illnesses and to the improvement of the quality of life of all whose lives are affected by these diseases. NAMI joins this brief in its belief that education and understanding about mental illness at all levels of judicial and legal systems is crucial to the appropriate disposition of cases involving offenders suffering from mental illness.

REASONS THE WRIT SHOULD BE GRANTED

I. INTRODUCTION

Twenty years ago, this Court heard the case of Alvin Ford, a schizophrenic death row inmate. Ford was delusional; he firmly and falsely believed that he could not be executed. Ford's attorneys argued that the Eighth Amendment prohibits the execution of persons who are incompetent or insane. This Court agreed. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). Justice Powell's

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

concurring opinion, which sought to "determine the precise definition" of "the category of defendants defined by their mental state" for whom the Eighth Amendment bars execution, *id.* at 419, provided what most lower courts now recognize as the standard for determining whether a State may execute a mentally ill or cognitively impaired prisoner. *See Penry v. Lynaugh*, 492 U.S. 302, 333 (1989). According to Justice Powell:

> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly . . . the Eighth Amendment forbids the execution only of those who are unaware of [1] the punishment they are about to suffer and [2] why they are to suffer it.

Ford, 477 U.S. at 422 (Powell, J., concurring) (emphasis added).[2]

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[2] In Ford's support, organizations of mental health professionals, including the American Psychiatric Association and the American Psychological Association entered as *amici curiae*, to ensure that "the process by which such decisions are made be fair and reliable so as to protect the integrity of the determination and the role to be played by psychiatric opinions in reaching that determination." Brief of Amicus Curiae for the American Psychiatric Association, *Ford v. Wainwright*, No. 85-5542 (1985); *see* Brief of Amici Curiae for the American Psychological Association and Florida Psychological Association, *Ford v. Wainwright*, No. 85-5542 (1985). The *amici* did not express opinion on the existence of an Eighth Amendment right or on the appropriate language for a governing legal standard; "resolution on those matters," one *amicus* wrote, "turns on considerations as to which [it] possesses no special expertise." *Id.* at 6. *Amici* simply urged that if there was a right protecting the insane from execution, the Court must not "denigrate" that right by skirting reliability of the evaluations upon which competency-to-be-executed determinations would rely. *See id.* at 7.

The Eighth Amendment categorical bar against executing incompetent persons – if it is to be applied fairly and reliably – is compromised by the Fifth Circuit's interpretation and application of the competency to be executed standard. In the past year, the American Psychiatric Association, the American Psychological Association, and the American Bar Association all have adopted resolutions or position statements addressing the execution of prisoners who suffer from severe mental illness. The American Psychiatric Association has publicly expressed concern over the Fifth Circuit's interpretation of the *Ford* standard, seeing in it "confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose for (reasons for) the execution." American Psychiatric Association, *Mentally Ill Prisoners on Death Row*, Commentary on Position Statement (Dec. 2005); *see* American Bar Association, Resolution 122A (Aug. 8, 2006). *Amici* share this concern. The important issue presented by this case is whether the competency to be executed standard currently used by the Fifth Circuit is under-inclusive in a constitutionally offensive manner. *Amici* submit that it is.

Panetti v. Dretke, 448 F.3d 815 (5th Cir. 2006) is a striking case, not only because of the severity of petitioner's mental illness, his farcical self-representation in the fiasco that served as his trial, and the widespread media coverage the case has received (*see, e.g.*, Blumenthal & Liptak, *Judging Whether a Killer Is Sane Enough to Die*, N.Y. Times (June 2, 2006)), but because unlike many cases involving testimony of psychiatric diagnosis and opinion, the experts agree that Panetti is severely mentally ill. In fact, they agree that Panetti suffers from schizophrenia, the most debilitating mental illness. The focus of this case, therefore, lies not in a battle of the experts as to whether Scott Panetti is severely mentally

ill, he clearly is and there is no dispute about it. The issue is whether his schizophrenia renders him incompetent to be executed; therefore, the focus of this brief is on the Fifth Circuit's interpretation and implementation of the constitutional mandate of *Ford*. *See Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006).

Amici have two central concerns. The first is the failure of the Fifth Circuit's competency to be executed standard to comport with the retributive rationale for the right espoused in *Ford*. *See* Petitioner's Brief at 24-32. The second concern, which is more significant to mental health professionals and organizations, is the fact that the Fifth Circuit's standard draws medically arbitrary distinctions between severely mentally ill persons. For both reasons, the Fifth Circuit's errant application of *Ford* wrongly and arbitrarily renders severely mentally ill prisoners subject to execution. More specifically, *Amici* are concerned here with death sentenced prisoners whose delusions, disorganized thought processes, or other mental impairments *directly* impact their ability to internalize the fact that they will be executed and/or the actual reason for their execution. The Fifth Circuit's interpretation of *Ford* wrongly excludes this set of prisoners from the Eighth Amendment category established in *Ford*.

Amici begin by explaining the delusional belief systems characteristic of schizophrenia. We then discuss how the Fifth Circuit's interpretation of *Ford* fails to take these significant impairments into account, specifically with regard to Mr. Panetti. Finally, we discuss a proper interpretation of *Ford*, one that was recently articulated and embraced by the American Psychiatric Association.

II. SCHIZOPHRENIA & DELUSIONAL BELIEF SYSTEMS

Within the set of prisoners whose delusions, disorganized thought processes, or other mental impairments *directly* impact their ability to internalize the finality of their execution and the actual reason for the execution, the most prevalent affliction, and that which affects Mr. Panetti, is schizophrenia. The clinical diagnosis of schizophrenia involves a finding of one of the following symptoms: (a) thought echo, thought insertion or withdrawal, or thought broadcasting; (b) delusions of control or influence or delusional perceptions; (c) hallucinatory voices; and (d) persistent delusions of other kinds that are culturally inappropriate and completely impossible. World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (Geneva, 1993). The diagnostic criteria for schizophrenia under the DSM-IV likewise involve a finding of one or two (depending upon severity) of the following symptoms: (1) delusions; (2) hallucinations; (3) disorganized speech; (4) grossly organized or catatonic behavior; (5) negative symptoms such as affective flattening. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Wash. DC, 1994). As the criteria show, perceptual and thought disorders are the core elements of the clinical definition of schizophrenia:

> The feature common to all manifestations of schizophrenia thought disorder is that patients think and reason on their autistic terms according to *their own* intricate private rules of *logic*. Schizophrenic patients may be highly intelligent, certainly not confused, and they may be painstaking in their abstractions and deductions. But

> their thought processes are strange and do *not* lead to conclusions based on *reality*. . . .

Cancro & Lehmann, *Schizophrenia: Clinical Features*, in Kaplan & Sadock's Comprehensive Textbook of Psychiatry, 7th ed., vol. 1 (2000), at 1189 (emphasis added).

The thought disorders – delusions – that underlie schizophrenia are often persistent. And often, from the perspective of everyone other than the patient, they do not equate with logic. *See* WHO, *ICD-10*. By definition, delusions are "false ideas that cannot be corrected by reasoning and that are idiosyncratic for the patient (i.e., not part of the patient's cultural environment). *Id.* at 1187; *see also Mental Health: A Report of the Surgeon General* (2002) ("Delusions are firmly held erroneous beliefs due to distortions or exaggerations of reasoning and/or misinterpretations of perceptions or experiences.") (internal quotation and citation omitted). Most commonly, the delusions experienced by a person suffering from schizophrenia involve a scenario of persecution accompanied by grandeur, battles between good and evil involving high stakes. Cancro & Lehmann at 1187-88. As the National Institute of Health explains:

> Delusions are false personal beliefs that are not part of the person's culture and do not change, even when other people present proof that the beliefs are not true or logical. People with schizophrenia can have delusions that are quite bizarre, such as believing that neighbors can control their behavior with magnetic waves, people on television are directing special messages to them, or radio stations are broadcasting their thoughts aloud to others. They may also have delusions of grandeur and think they are famous

> historical figures. People with paranoid schizophrenia can believe that others are deliberately cheating, harassing, poisoning, spying upon, or plotting against them or the people they care about. These beliefs are called delusions of persecution.

NIMH, *Schizophrenia*, NIH Publication No. 3517 (2004).

In sum, two defining features characterize the delusions that make up schizophrenia: first, the delusions are not based on the patient's cultural environment – in broad terms, they are not based on reality; second, the delusions are firmly held beliefs that are not subject to change, even in the presence of true, logical proof. Neither feature, however, factors into the Fifth Circuit's interpretation of *Ford*.

III. THE FIFTH CIRCUIT'S MISGUIDED INTERPRETATION OF *FORD*

The Fifth Circuit maintains that it uses Justice Powell's competency to be executed standard in evaluating *Ford* claims. *Panetti*, 448 F.3d at 819 (citing *Lowenfield v. Butler*, 843 F.2d 183, 187 (5th Cir. 1988)). But the Court of Appeals' interpretation of what it means for a prisoner to be "unaware of the punishment they are about to suffer and why they are to suffer it," *Ford*, 477 U.S. at 422 (Powell, J., concurring), only partially encompasses the mentally ill individuals Justice Powell had in mind. The Fifth Circuit's understanding of the competency to be executed standard is essentially this: A severely mentally ill prisoner is competent to be executed if he is merely aware of the reason the State has given for executing him. According to the Court of Appeals, a prisoner need not "rationally understand" or comprehend the reason for his

execution, he need only be "aware" of it. *Panetti*, 448 F.3d at 819 (citing *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994)).

In *Barnard*, the Fifth Circuit found a prisoner competent who knew he was to be executed on a certain day, and who knew he was to be executed for killing a boy during a robbery. The court deemed it of no consequence that the prisoner simultaneously believed his pending execution was the final chapter of a delusional conspiracy against him rather than punishment for felony murder. 13 F.3d at 876. In this case, the court concluded that Panetti's competency claim was governed by *Barnard*. And the court ruled Panetti competent because Panetti can parrot that the State told him he would be executed for killing his wife's parents. That, according to the court below, satisfied the "nature, pendency, and purpose" test the court applied in *Barnard*. *Panetti*, 448 F.3d at 819.

A. The Factual Discrepancy Between *Barnard* And *Ford*

Barnard, however, is fundamentally at odds with *Ford*. The starkest evidence that the line the Fifth Circuit has drawn is not one this Court intended is that, by the Fifth Circuit's approach, the symptoms alleged by Alvin Ford, whose claims gave rise to the governing standard, would not make the constitutional cut. In response to assertions that he would be executed, Alvin Ford acknowledged, "I know there is some sort of death penalty." *Ford*, 477 U.S. at 403. But Ford also believed that he had eliminated executions and therefore could not suffer the death penalty. *Id.* In essence, Ford's response when told of his impending execution was, "I know you say there is a death

penalty by which you will execute me, but I do not believe it." Ford's belief that he had eliminated executions, coupled with his perception that he "owned the prisons and could control the Governor through mind waves," *id.*, was firmly at odds with reality.

Contrary to *Barnard*, a plurality of this Court viewed the dichotomy between reality and Ford's delusional belief as evidence of incompetence, justifying a remand to state court for a competency hearing. *Id.* at 410 ("Petitioner's allegation of insanity in his habeas corpus petition, if proved, therefore, would bar his execution."). And Justice Powell, reviewing the facts under his newly announced standard for competence to be executed, asserted that if the facts Ford presented were accurate, "petitioner's claim of insanity plainly fits within this standard. According to petitioner's proffered psychiatric examination, petitioner does not know that he is to be executed, but rather believes that the death penalty has been invalidated." *Id.* at 422 (Powell, J., concurring).[3] For both the majority and concurring opinions in *Ford*, execution could only be justified if it had retributive value. And that value, in the Court's view, was lost on prisoners like Ford, who did not believe and therefore had not internalized the finality of execution.

The facts of *Ford* display the flaws in the Fifth Circuit's interpretation of Justice Powell's standard. That court fails to take into account precisely the thought impairments and the resulting impossible beliefs that the

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[3] Unlike *Ford*, Panetti's delusional belief system affects his ability to appreciate the reason "why" he will be executed, rather than, as in Ford's case, the fact of execution itself.

Ford Court found indicative of incompetence. The Fifth Circuit ignores the medical condition, deemed relevant in *Ford*, in which dichotomous belief systems impair mentally ill prisoners from internalizing "why" they will be executed.[4]

B. Panetti Deserves Protection Under *Ford*, But Is Denied It Under *Barnard*

Mr. Panetti's schizophrenic symptoms place him well within the category of severely mentally ill persons whose executions are prohibited by the Eighth Amendment. Since 1986 (six years prior to the crime), Panetti has been diagnosed repeatedly as suffering from schizophrenia or schizoaffective disorder.[5] No diagnosis has contradicted

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[4] The Fifth Circuit's decision in *Lowenfield*, cited by the Fifth Circuit as the case in which it adopted Justice Powell's standard, treads much more closely to *Ford* than *Barnard*. In *Lowenfield*, the Fifth Circuit held that a diagnosis by a single psychologist that the defendant was a paranoid schizophrenic did not present a threshold showing of incompetence to be executed under *Ford*. 843 F.3d at 187. *Lowenfield* characterized the *Ford* standard as whether the prisoner "'comprehends the nature of the penalty' and whether the prisoner's mental illness 'prevents him from comprehending the reasons for the penalty or its implications.'" *Id.* at 187 (quoting *Ford*, 477 U.S. at 417).

[5] *See* Scott Panetti's medical records, admitted as State Exhibits 1 through 6 at the second competency-to-stand-trial proceeding in 1994: Panetti was diagnosed at Starlite Village Hospital with chronic undifferentiated schizophrenia in April 1986; diagnosed at Kerrville State Hospital with schizophrenia in mid-May 1986; diagnosed at Waco Veteran's Hospital with chronic undifferentiated schizophrenia in late May 1986; diagnosed at Tomah Veteran's Hospital with schizophrenia in July 1986; diagnosed at Starlite Village Hospital with schizophrenia in October 1986; diagnosed at Kerrville Veterans Hospital as suffering from schizoaffective disorder in November 1986; and diagnosed at Kerrville Veterans Hospital as suffering from schizoaffective disorder in 1992, just months before crime. Panetti

(Continued on following page)

that Panetti suffers from a schizophrenic condition.[6] Both doctors who examined Panetti to determine his competence to stand trial recognized schizophrenia and schizophrenic symptoms. *See* Petitioner's Brief at 4-7. Both agreed that Panetti's delusions and other symptoms would worsen if Panetti stopped taking antipsychotic medication, which he did shortly before representing himself at trial

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was also diagnosed at Cumberland Memorial Hospital with depression, brain dysfunction, auditory hallucinations, homicidal ideations, and delusions in August 1986; diagnosed at Northern Pines Unified Services Center as suffering from depression and suicidal ideation in September 1986; committed to Kerrville State Hospital in 1990 for homicidal behavior after threatening to kill himself, his wife, baby, and father-in-law, believing the citizens of Kerrville were plotting against him. These diagnoses are not inconsistent with the diagnoses of schizophrenia. Further, during the competency-to-be-executed proceedings, Dr. Conroy, a forensic psychologist, diagnosed Panetti as suffering from schizoaffective disorder, a form of schizophrenia. *See* transcript of federal district court competency-to-be-executed hearing, vol.1, at 14, 21-22 (*Amici* adopt Petitioner's citation form and will refer to the hearing transcript as "FH"). Dr. Cunningham, a clinical and forensic psychologist, testified that Panetti suffers from a disorder on the schizophrenic and/or schizoaffective spectrum, that he is actively psychotic. *See Panetti v. Dretke*, 401 F.Supp.2d 702, 707 (W.D. Texas 2004) (finding Panetti suffers from "some form of mental illness", which doctors had characterized as schizoaffective disorder).

[6] Of the experts appointed during the competency-to-be-executed proceedings, Dr. Anderson, a court-appointed forensic psychiatrist, refused to diagnose schizophrenia because she did not believe the diagnosis relevant to the *Ford* standard (Dr. Anderson also did not reach a conclusion as to whether Panetti was competent to be executed.). 2 FH 40-41. Dr. Parker, a court-appointed clinical psychologist, found that Panetti has "serious psychological problems." 1 FH at 134. Dr. Rosin, a psychologist, recognized that Panetti suffered from a fixed delusional system. 1 FH at 82, 89-90. And Dr. Silverman, a psychiatrist, testified that the dosages of medication that Panetti was taking before trial were "diagnostic of psychotic illness." 1 FH at 122.

and which he never resumed.[7] *See* Petitioner's Brief at 8-10. And each of the mental health experts who testified during the District Court competency hearings agreed (whether they reported a diagnosis of schizophrenia or not) that Panetti suffers from a fixed delusional belief system: While Panetti is aware of the State's stated reason for executing him, he believes that the State, in conjunction with forces of darkness, wants to kill him for preaching the Gospel. *See Panetti*, 401 F.Supp.2d at 708-09; *id.* at 708, n.3. Panetti's mind holds a composite belief that is completely impossible.

Under *Barnard*, this dichotomy – and more important, this tension – between reality and Panetti's delusion is irrelevant. But under *Ford*, the fact that Panetti believes the State's explanation for his execution is a "sham," (1 FH

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[7] That Panetti was permitted to represent himself after going off the antipsychotic medication he was taking when found competent to stand trial is also profoundly troubling to *Amici*. *See* Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 Cath. U. L. Rev. 1153, 1163-65 (2005); *see also* Jodi L. Vilojen et al., *An Examination of the Relationship Between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology*, 26:5 Law & Hum. Behav. 481, 497 (2002) ("In comparison to defendants with other types of psychotic disorders . . . defendants with schizophrenia demonstrated considerable more impairment on legal abilities. This finding is consistent with the high rates of cognitive and functional impairments in individuals with schizophrenia."). Two doctors who had previously treated Panetti, and who had previously diagnosed him as suffering from schizophrenia, watched the trial. Dr. F. E. Seale who treated Panetti at Starlite Village Hospital in 1986 stated that during the trial Panetti was suffering from "delusion," "totally out of touch with reality," and "obviously mentally ill." Affidavit of F. E. Seale, Ph.D. Dr. Wolfgang Selck, who treated Panetti at Starlite Village Hospital in April 1986, stated that Panetti's inappropriate and grandiose self-representation at trial was the product of delusion and constituted a "break from reality." Affidavit of Wolfgang Selck, Ph.D.

at 25; *see* Petitioner's Brief at 20), a pretextual explanation by authorities to cover up the forces of darkness' plot to stop his preaching of the Gospel, eviscerates the retributive benefit of executing the man. It is evident that Panetti, though aware of his legal proceedings, has not internalized "the nature of the debt that [he] owe[s] society." Christopher Slobogin, *Minding Justice: Laws That Deprive People With Mental Disability of Life and Liberty*, at 94 (Harvard University Press, 2006). In accord with the retributive rationale for the Eighth Amendment right adopted by the *Ford* majority and concurring opinions, Panetti's express disbelief of the State's reason is clear evidence that he is incompetent.

IV. THE PROPER INTERPRETATION OF THE *FORD* STANDARD: MERE "AWARENESS" IS NOT A MEANINGFUL REQUIREMENT FOR A STANDARD PREVENTING EXECUTION OF THE INSANE

This case exemplifies why mere "awareness," the test applied by the Fifth Circuit, is not a meaningful requirement for determining whether to execute prisoners who are severely mentally ill. The mere awareness test makes no sense when applied to a prisoner who is plagued by delusions of grand persecution, as severely mentally ill, schizophrenic individuals like Mr. Ford and Mr. Panetti very often are. From the perspective of the mental health profession, and with regard to diagnoses of schizophrenia and related mental illnesses in particular, the distinction that the Fifth Circuit draws between "rational understanding" and "awareness," *see Panetti*, 448 F.3d at 819-21

(citing *Barnard*), is false. A severely mentally ill patient who lacks "actual awareness," lacks awareness, period.[8] Hence the concern of the American Psychiatric Association over the Fifth Circuit's decision in *Barnard*:

> There has been some confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose for (reasons for) the execution. In *Barnard v. Collins*, decided by the Fifth Circuit in 1994, the state habeas court had found that Barnard's "perception of the reason for his conviction and impending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia." Despite the fact that Barnard's understanding of the reason for his execution was impaired by delusions, the Fifth Circuit concluded that his awareness that "his pending execution was because he had been found guilty of the crime," was sufficient to support the state habeas court's legal conclusion that he was competent to be executed.

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[8] This is not a matter of epistemology about what it means to "know" – certainly there are different types of knowledge, in linguistic terms and in legal standards, and it is the law's provenance to determine the meaning of "knowledge" or "awareness" in any given context. Nor does the issue here involve a metaphysical debate over the nature of life and death. *Cf. Walton v. Johnson*, 440 F.3d 160, 179 (4th Cir. 2006) (Wilkinson, J. concurring) ("Judges called upon to interpret the Eighth Amendment may not engage in metaphysical inquiries under the guise of constitutional interpretation. . . . The Powell test appreciates that the Constitution does not countenance judicial forays into inherently philosophical arenas."). *Amici*'s contention is simply that the *Barnard* test excludes persons who are in fact incompetent to be executed.

> In order to emphasize the need for a deeper understanding of the state's justifying purpose for the execution, [the APA] would require that an offender not only must be "aware" of the nature and purpose of punishment but also *must "appreciate" its personal application in the offender's own case* – that is, why it is being imposed on the offender. This formulation is analogous to the distinction often drawn between a "factual understanding" and a "rational understanding" of the reason for the execution. If, as is generally assumed, the primary purpose of the competence-to-be executed requirement is to vindicate the retributive aim of punishment, then offenders should have more than a shallow understanding of why they are being executed.

American Psychiatric Association, *Mentally Ill Prisoners on Death Row*, Commentary on Position Statement (Dec. 2005) (emphasis added) (citations omitted); *accord Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty*, 54 Cath. U. L. Rev. 1115 (2005), § 3(a); Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Cath. U. L. Rev. 1169, 1173 (2005).

As the APA emphasizes, mere "awareness" of "the nature and purpose of punishment" has little meaning in the context of an individual suffering from delusional belief systems. *Amici* agree with the APA that a meaningful (and faithful) interpretation of the *Ford* standard requires more; a mentally ill individual must "appreciate" the "personal application" of the punishment "in the offender's own case." To be competent, a prisoner must have the capacity to reflect on the execution as punishment for the crime

committed and *internalize the execution as payback to society*. This requires that a condemned inmate have enough grasp of reality to believe that he really will die, and enough to believe that the real reason he will die is because of his crime.[9]

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[9] It is important to emphasize that *Amici*'s position is not that *all* prisoners diagnosed with schizophrenia are categorically incompetent for execution. Nor is *Amici*'s position that *Ford* exempts from execution *only* those who have been diagnosed with schizophrenia or a particular mental illness. *See* Honberg, 54 Cath. U. L. Rev. at 1166 ("If we define mental illness diagnostically in a narrow way with just five or six discrete diagnoses, we would be under-inclusive. This would exclude some people who may not fit within the specified diagnostic categories, but who nevertheless may be profoundly disabled."). Schizophrenia has a diverse and yet undetermined causality. *See* www.NAMI.org ("Scientists still do not know the specific causes of schizophrenia, but research has shown that the brains of people with schizophrenia are different, as a group, from the brains of people without the illness. Like many other medical illnesses such as cancer or diabetes, schizophrenia seems to be caused by a combination of problems including genetic vulnerability and environmental factors that occur during a person's development.") (last visited Oct. 8, 2006). And the illness is manifest by a variety of symptoms: Overt symptoms, such as delusions and hallucinations; disorganized systems, such as confused thinking, speech, and behavior; and negative symptoms, such as emotional flatness, lack of expression, and an inability to start and complete activities, all support a diagnosis of schizophrenia. *See* www.NAMI.org ("No one symptom positively identifies schizophrenia. All of the symptoms of this illness can also be found in other brain disorders."); *see generally* National Institute of Mental Health, *Schizophrenia*, available at www.nimh.nih.gov/publicat/schizoph.cfm (last visited Oct. 8, 2006).

But not all of these symptoms impair a prisoner's ability to be "aware of the punishment they are about to suffer and why they are to suffer it." *See Ford*, 477 U.S. at 422 (Powell, J., concurrence). Emotional flatness or lack of expression, for example, has little to say, beyond suggesting the presence of other symptoms of schizophrenia, about a person's ability to comprehend a State's reason for execution or the fact of execution itself. Even overt symptoms such as hallucinations and delusions, and disorganized symptoms such as loose association, may not render a prisoner incompetent to be executed unless those

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A prisoner like Ford, who does not believe he will die and who fails to appreciate the finality of execution, never internalizes punishment and does not acknowledge the payback to society manifest in execution. Likewise, a prisoner like Panetti, who believes he is being executed for preaching the Gospel – an affront to forces of darkness wholly beyond social reality – never internalizes that his execution is remuneration to society. As the APA stresses, prisoners suffering from mental impairments like Barnard and Panetti should not be deemed competent for execution under *Ford*. But they *are* in the Fifth Circuit.

A legal test measuring a death sentenced inmate's competency to be executed cannot be inherently inconsistent with medical knowledge, practice and standards. When a court distinguishes between mentally ill prisoners based on a parsing of words or a subjective choice from a variety of dictionary definitions – distinctions that make no medical sense – a court undermines the expert evaluations upon which the competency hearing itself is based, and thus undercuts the reliability of the determination. The Fifth Circuit's parsimonious interpretation of *Ford* thwarts the views of the qualified physicians who examined Scott Panetti, and, thereby, renders the competency determination unreliable.

Amici endorse the APA's interpretation of the *Ford* standard as in accord with the retributive rationale adhered to in *Ford* and as a proper definition of the range of debilitating mental illness that a majority of the Court

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symptoms directly impair the prisoner's ability to appreciate the finality of the execution and to acknowledge the retributive nature of the punishment, the execution as payback to society for the crime the prisoner committed.

and Justice Powell believed the Eighth Amendment protects. *Amici* urge this Court to grant certiorari to address the Fifth ~~Circuit~~ Court of Appeals' erroneous interpretation and application of Justice Powell's standard.

CONCLUSION

WHEREFORE, for the reasons set forth above, the writ of certiorari should be granted.

Respectfully submitted,

JOHN H. BLUME*
CHRISTOPHER SEEDS
CORNELL LAW SCHOOL
110 Myron Taylor Hall
Ithaca, New York 14853
(607) 255-1030

QUARLES & BRADY LLP
411 E. Wisconsin Ave.
Milwaukee, WI 53202
(414) 277-5000

**Counsel of Record* *Attorneys for Amicus Curiae*

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